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October 13, 2016

Chairman Tom Wheeler
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

I write regarding the FCC's proposed final privacy rules and the agenda for the agency's planned Open Meeting on October 27, 2016.

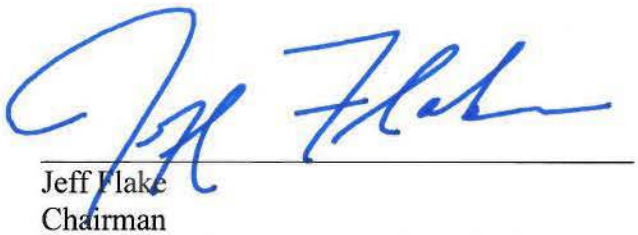
On October 6, you issued a "fact sheet" on the proposed privacy rules. According to the fact sheet, the privacy rules will be substantially changed in their next iteration. Most relevant to my purposes, the fact sheet appears to describe final rules that will broadly resemble the FTC privacy framework. Rather than requiring a near-blanket opt-in requirement for the marketing use of ISP data, it seems the proposed rules will be based on the sensitivity of the information in question.

This is a step in the right direction. I am pleased to see that you have decided to align the FCC's privacy proposal with the established framework of the FTC. As I said during the hearing I chaired on this proposed rule last May, "the FTC ha[s] successfully enforced privacy against broadband providers. Except for the [FCC's] net neutrality order, the FTC would still be doing that. … many wonder what justifies the new proposed rules, which are a significant deviation from the FTC's approach and more burdensome as well." At that same hearing I asked FTC Chairwoman Ramirez if "the FTC's privacy protection regime over the years has been sufficient to effectively protect consumers' rights as it relates to ISPs?" Her response was, "I think the Federal Trade Commission has done a very effective job in addressing consumer primacy and ensuring that consumer information is appropriately safeguarded." Indeed, as I identified to the Commission in comments submitted in June, the NPRM's proposed rules had serious constitutional deficiencies in significant part due to the effective and less-restrictive privacy regime currently in place at the FTC. It is good to see the FCC seem to move in the FTC's direction.

Nevertheless, the devil is always in the details. While the proposed changes presented in the fact sheet look like a substantial improvement over the original NPRM, it's not clear yet what the actual Order will entail. These new proposed rules will need to be fully vetted from both a policy and a constitutional perspective. Due to FCC rules, I'm told that no one outside the Commission has seen the proposed Order. Given the significant and material differences between the current proposal and the NPRM, it is essential that all stakeholders be given an opportunity to review and comment on the current proposal before the Commission votes on it.

When the NPRM was under consideration you told me at our subcommittee hearing that there would be "a filling-up record … a voluminous record on this." Given the changes indicated between the NPRM and the contemplated Order, I think it only best that a similar "voluminous" record be established before we dive into this new regulatory regime. The continued vibrancy of the Internet is too important for the FCC to rush into this rulemaking in a slapdash manner. I therefore ask that you postpone any final vote on the privacy Order and notice this new proposed rule for comment.

Sincerely,



Jeff Flake
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Privacy, Technology & the Law

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October 24, 2016

Chairman Tom Wheeler
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

I write regarding the FCC's proposed final privacy rules. As you recall, I wrote to you on October 13 requesting that these proposed final rules be published for further notice and comment. While I am waiting for a formal reply to my letter, it is my understanding that you will not be accommodating my request to provide for a deliberative process and that the Commission will instead forge ahead with the vote on a final rule on October 27, 2016. This is unfortunate. Nevertheless, since the Commission will be voting soon on a final rule, I wanted to more fully express my serious concerns with the bare-boned sketch of the order that has been presented to the public so far in your October 6 "fact sheet" and blog post.

As I noted in my prior letter, there are aspects of your new proposal that are encouraging. The FTC's approach to data privacy has worked, so it's good to see the FCC acknowledge that and take steps in that direction. The problem is that the FCC—from what the fact sheet says; again, we won't know for sure until the rules are actually in place—seems to be going significantly beyond the actual FTC approach. I believe this departure from the FTC's privacy regime will create significant legal and policy problems for the Commission. However, most importantly, these final rules are a threat to the continued dynamic development of the Internet.

As I explained at length in comments to the Commission last May, the proposal in the NPRM was riddled with constitutional problems. I believe the Commission's planned position fails all three elements of the *Central Hudson* test, thereby making it an unconstitutional restriction on commercial speech. Under *Central Hudson*, the final question in testing a commercial-speech restriction is whether the action "is no more extensive than necessary to further the State's interest. …" There must be "a fit" between the end and the means. Given the differences between the FCC and the FTC's approach to the sensitivity of data—in particular, the FCC's inclusion of web browsing history as well as app usage history in the category of sensitive data—the FCC's regulations are undoubtedly more restrictive than the FTC's approach. There is insufficient evidence that ISP use of these two additional categories of sensitive data is, or will be, different than those regulated under the FTC's privacy regime. Given the FTC's longstanding, successful, and less restrictive protection of consumer privacy, it's not clear that this new proposed FCC regime passes constitutional muster.

Leaving aside the legal concerns with treating ISP data differently from the data protected by the FTC, it's also bad policy. The inclusion of web browsing and app usage in the FCC's category of sensitive information will result in arbitrary competitive advantages and disadvantages within the space of online advertisement. This only favors established market actors and is bad for both competition and consumers. It's also confusing. Internet users will have different expectations of privacy; when they share information on the edge, it will be FTC rules, while that same information will be under different FCC rules as it travels across their wire or data plans.

In the end, I am concerned that this confusion will result in greater government control of the Internet and the data economy. As a stakeholder noted in a recent letter to the Commission, "a categorical distinction between web browsing information and other information" is "a novel and untested approach [and] would unnecessarily increase regulatory burdens on the Internet." Indeed, I agree with Commissioner Pai in his dissent from the NPRM, when he noted that the "disparate privacy regime" between ISPs and other participants in the Internet ecosystem "is simply a political choice." The contemplated order by the FCC lays the groundwork for future political choices—by it and the FTC—to synchronize privacy regulations across platforms, but to do so according to the more stringent opt-in regime currently contemplated by the FCC. The FCC seems all too ready to impress upon the Internet a "novel and untested approach" regardless of the consequences it will have on the future of the Internet.

It's unfortunate that others and I are left making these arguments in the dark. We can guess what these final rules are going to do by parsing the NPRM in light of a blog post and fact sheet. But reading what we have in the way of tea leaves, the omens are bad. I urge you, at a minimum, not to deviate from the FTC's effective and established approach to consumer privacy as you enact your final order.

Sincerely,

Jeff Flake
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Privacy, Technology & the Law

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 14, 2016

The Honorable Jeff Flake
Chairman
Subcommittee on Privacy, Technology & the Law
United States Senate
413 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Flake:

Thank you for your letters regarding the newly adopted broadband privacy rules.

At the October 27 Open Meeting, the Commission voted to adopt rules protecting consumers' broadband privacy. As I have said in prior letters, consumers in today's digital world deserve the ability to make informed choices about their online privacy. Before the Commission adopted the Broadband Privacy Order, there were no rules outlining how broadband Internet access service providers may use and share their customers' private information. Consumers are now empowered to decide how their information is used and shared by their telecommunications carriers. And the broadband privacy rules ensure that consumers have the increased choice, transparency, and security that they deserve.

In your letter dated October 13, you expressed concern that the Commission was not seeking additional comment from stakeholders on the proposed broadband privacy rules. The Commission's rulemaking process, which has been followed for years by both Democratic and Republican Chairs, is designed to give stakeholders and members of the public ample opportunity to engage in a transparent and vigorous discussion. This produced the "voluminous record" that I mentioned at the May subcommittee hearing you chaired on broadband privacy. This process is also designed to give commissioners a three-week period to discuss in confidence the substance of an item before final decisions are released. This process is commonplace for administrative agencies, and ensures that the FCC adheres to the Administrative Procedure Act, which requires us to consider and address all comments received on our proposals.

As you know, upon circulating the proposed broadband privacy rules to my fellow Commissioners, I published a fact sheet and blog post describing the proposed rules to allow the public to understand and engage with us on the broadband privacy issues before the Commission. Stakeholders continued to meaningfully provide the Commission with input on the publicly available information before the October 27 Open Meeting. And, notably, after the fact sheet and blog post were released, FTC Chairwoman Edith Ramirez issued a supportive statement, stating, "I am pleased to see the FCC moving forward to protect the privacy of millions of broadband users across the country. The FTC . . . provided formal comment to the

FCC on the proposed rulemaking, and I believe that our input has helped strengthen this important initiative."

In your letter dated October 24, you expressed concern that the adopted broadband privacy rules violate the First Amendment's protection of commercial speech. In adopting Section 222 of the Communications Act, Congress identified a substantial government interest in protecting the privacy of customers of telecommunications services. The Commission's Order adopting and revising rules pursuant to Section 222 recognizes and honors that same substantial interest. As we explain in the Broadband Privacy Order, the sensitivity-based framework, which gives customer the tools needed to make decisions about their telecommunications carriers' use and sharing of their information, meets the three-part test for regulation of commercial speech outlined in the *Central Hudson* case you reference.

Your letter also expressed concern that including web browsing and app usage in the Commission's category of sensitive information is confusing for consumers and could create an unfair advantage for established actors in the online-advertising marketplace. I can assure you that consumers' interests and expectations were at the heart of this proceeding. As I have said before, a consumer who hires a carrier to deliver information does not believe that he or she is consenting to the carrier's use of that information for other purposes. However, the adopted rules do not prohibit broadband Internet access providers from using or sharing their customers' information—they simply require broadband Internet access providers to ask for permission first.

I appreciate your interest in this matter. Your views are very important and I have asked that your letters be included in the record of the proceeding. Please let me know if I can be of any further assistance.

Sincerely,

Tom Wheeler